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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CORY SPENCER, et al.
Plaintiffs,

v.

LUNADA BAY BOYS, et al.
Defendants.

CASE NO. 2:16-cv-02129-SJO (RAOx)

**[PROPOSED JOINT STATEMENT
REGARDING PLAINTIFFS'
MOTION TO COMPEL
DEFENDANT, SANG LEE'S
PRODUCTION OF DOCUMENTS**

[Filed Concurrently with: Notice of
Motion; Declaration of Victor Otten]

Judge: Hon. Rozella A. Oliver
Date: August 6, 2017
Time: 10:00 am
Crtrm.: F, 9th Floor____

Complaint Filed: March 29, 2016
Trial Date: November 7, 2017

As discussed at the July 26, 2016 hearing with the Hon. Rozella A. Oliver, Plaintiffs' submit this Motion to Compel Defendant Sang Lee's Further Responses to Plaintiffs Request for Production of Documents, Set One.

I. INTRODUCTION

A. Plaintiffs' Introductory Statement

Early in this litigation, Plaintiffs' counsel sent letters to the attorneys for each of the Defendants requesting that they remind their clients not to alter, delete or destroy any evidence relating to this lawsuit. In the few documents that were eventually produced by the Defendants, it soon became obvious that documents were either being unreasonably withheld by defense counsel or had been destroyed by their clients.

Defendants Alan Johnston, Charley Ferrara, Frank Ferrara, Angelo Ferrara and NF all failed to produce a single document in response to Plaintiffs Requests for Production of Documents, Set One. Each of their responses were full of improper objections and/or stated that the defendants were not in possession of responsive documents. It took a Motion to Compel Defendant Johnston and a Court Order to respond to finally discover what appeared obvious- that Johnston had withheld evidence and deleted text messages from his cell phone¹. When the Plaintiffs finally received the first document from Mr. Johnston, it contained an email from Bay Boy

¹ (See, Docket No. 142.)

Charlie Mowat to Defendant Alan Johnston and eight others that states: “My source tells me that a class action lawsuit is in the works against the “bay boys” and the city of PVE probably that Diana bitch” and cautioned everyone “to be on the ultra down-low.”² (Ottens Decl., ¶2; Exhibit 1)

Defendant Sang Lee's Responses to Plaintiffs Requests for Production of Documents, Set One, withheld hundreds of documents and no privilege log was attached. Finally, when a privilege log was provided, it was unintelligible. This is best observed by the following example:

BATES NUMBER	DOCUMENT DESCRIPTION	FROM	TO	PRIVILEGE CLAIMED
Lee 0000114	Incoming and outgoing text messages from 1/28/16-2/10/16	Pete Babros Individuals unrelated to this lawsuit.	Sang Lee	Information non- responsive to the request was redacted.

There is no reason to lump the texts from a 13-day period into a single entry of a privilege log unless you are trying to hide something; this is especially true when one of the most significant events occurring in this lawsuit was on January 29, 2016. Because the Court recently ordered Sang Lee’s attorneys to produce an unredacted extraction report, we now know that the privileges asserted were totally bogus. For example, there were texts messages to Michael S. Papayans and Reno

² Mowat admits that he sent the text. Although having never met Plaintiff Diana Reed, stated: “No. I just think she was -- I could tell people's body language and the way people are and she just looked like a bitch to me and a liar.” (Mowat Dep. 190:12-14; 187:8-18; Decl. Ottens; Exhibit 5)

1 Caldwell who are Bay Boys. Most importantly, on January 29, 2016, there were at
2 least 18 text messages between Sang Lee and Brant Blakeman which have been
3 deleted. Defendant Blakeman, however, testified in his deposition that he rarely
4 used his cell phone to text and when he did it was only with his wife.

5 Q. Do you receive texts on your phone?

6 A. No. I -- no. I mean -- from my wife and stuff,
7 (Blakeman Depo., 241:5-7; Decl. Otten, Exhibit 2);

8 When Blakeman was asked in his deposition for the number of his cell phone,
9 he gave Plaintiffs' counsel an incorrect phone number, identifying the last four digits
10 of his cell phone number as "7634"); Defendant Blakeman's Response to Plaintiff
11 Diana Reed's First Set of Interrogatories, Interrogatory No. 1 (identifying the last
12 four digits of his cell phone number as "7934").

13 Q. Do you text on your flip phone?

14 A. Yes.

15 Q. What's the telephone number for that phone?

16 A. I use it so infrequently I -- 47 -- wait, wait. (424)477-7634, I think or...
17 (Blakeman Depo., 14:19-25; Decl. Otten, Exhibit 3)

18 When asked if he ever received a text about the incident at Lunada Bay with
19 Diana Reed, Blakeman stated "No". As it turns out, Blakeman was not being
20 truthful. In the phone extraction report that the Court ordered Defendant Sang Lee
21 to produce, it shows that there were many text messages involving Blakeman that
22 had been deleted. (Otten Decl., ¶6)

23 In response to a request for production of documents seeking text messages
24 with co-Defendants, Defendants Charlie and Frank Ferrara claimed not to possess
25 any such evidence. But, text messages from those Defendants also appeared in the
26 extraction report of Sang Lees phone and indicate that they were not deleted (see
27 LEE000673 and LEE000081). Despite statements made by this Court at the July 27,
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1 2017 hearing regarding Plaintiffs right to discovery, the Defendants still have
2 refused to turn over discovery. (Otten Decl., ¶7)

3 The Defendants and their attorneys have intentionally withheld and continue
4 to withhold evidence. It is also evident that the Defendants have intentionally
5 destroyed evidence. The Plaintiffs have been severely prejudiced in the fact that
6 they had to file oppositions to Defendants Motions for Summary Adjudication
7 without evidence in the possession of Defendants and/or their attorneys.
8 Additionally, and even more problematic is that the Defendants have destroyed
9 evidence and are defending this action on the basis on the lack of evidence. (Otten
10 Decl., ¶8)

11 Plaintiffs are requesting that Defendant Sang Lee be ordered to produce all
12 the documents that have not been turned over, and a ruling that the objections and/or
13 privileges are not proper. Plaintiffs are also seeking an order that Defendant Sang
14 Lee and his attorneys improperly withheld documents and an order that Defendant
15 Sang Lee destroyed evidence. (Otten Decl., ¶9)

16 **B. Defendant's Introductory Statement**

17 [Intentionally left blank for response]

18 **II. PLAINTIFFS' STATEMENT OF FACTS**

19 On July 6, 2016, Plaintiffs' counsel sent a litigation hold letter to the attorney
20 for Sang Lee, Edward E. Ward, Jr., requesting that he remind his client not to alter,
21 delete or destroy any evidence relating to the lawsuit. ((Otten Decl., ¶9; Exhibit 4))

22 On November 7, 2016, Plaintiff Cory Spencer served Request For Production
23 of Documents (Set One) on Defendant, Sang Lee. Among other things, these
24 requests seek copies of text messages and emails between Defendant Lee and other
25 individuals whom Plaintiffs believe were involved in the incidents described in
26 Plaintiffs' lawsuit (Otten Decl., ¶11; Exhibit 6)

27 Defendant Sang Lee's Responses to Plaintiffs' Requests for Production of
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1 Documents, Set One, and the accompanying production bearing Bates labels Lee
2 00000001 through 000000596, were served on December 12, 2016. The response
3 contained 43 documents. The Bates No. of the last document produced is
4 Lee0000592 indicating that 549 documents are being withheld but no privilege log
5 was attached. Document number Lee0000029 is an extraction report for Sang Lee's
6 phone which was created on December 7, 2016. (Otten Decl., ¶12; Exhibit 7)

7 On December 20, 2016 Plaintiffs' counsel sent a meet and confer letter to
8 Tera Lutz regarding Sang Lees Responses to Plaintiffs Request for Production of
9 Documents. Set One. The letter raised various issues regarding Mr. Lee's Responses
10 to Plaintiffs Requests for Production of Documents, Set One. In summary, several of
11 Lee's responses to Request for Production of Documents failed to state if he is in
12 possession of responsive documents. Even more of the responses contained
13 unwarranted objections such as "vague, ambiguous, and overbroad." When asserting
14 those objections, Lee did not specify the basis for such objections. In response to
15 Request No. 31, Lee improperly objected to Plaintiffs request for Lee's cell phone
16 bills since January 1, 2013, on the grounds that the Request "seeks information
17 protected by fundamental federal and state privacy principals, privileges, and laws."
18 Yet the parties had entered into a protective order. (Otten Decl., ¶13; Exhibit 8)

19 On or about January 24, 2017 Plaintiffs' counsel wrote to Sang Lee's
20 attorneys requesting pursuant to the Federal Rules of Civil Procedure and the Local
21 Rules of the Central District of California to meet and confer in a good faith effort to
22 eliminate or narrow the issues raised in this letter. (Otten Decl., ¶14).

23 On Wednesday, February 1, 2017, Vic Otten co-counsel to Plaintiffs, and
24 Tera Lutz of Lewis Brisbois Bisgaard & Smith and Daniel Crowley of Booth
25 Mitchel & Strange on behalf of Defendant Sang Lee met and conferred at Otten
26 Law, PC. While originally, the Plaintiffs believed that our meet and confer was
27 conducted in good faith, that belief has been challenged by what appears to be
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1 efforts on the part of Lee to withhold relevant evidence. (Otten Decl., ¶15).

2 On or about May 25, 2017 Plaintiffs' counsel sent a follow-up meet and
3 confer to Sang Lee's attorneys regarding the Responses to Plaintiffs Request for
4 Production of Documents. Set One. (Otten Decl., ¶16; Exhibit 9)

5 Sang Lee's attorneys responded by letter dated May 26, 2017. The three-
6 paragraph letter failed to address nearly all of the issues raised in Plaintiffs previous
7 attempts to meet and confer. The letter states: "Redacted messages are between Mr.
8 Lee and family members and friends unrelated to this mater." Because the Court
9 recently ordered Sang Lee's attorneys to produce an unredacted extraction report,
10 we now know that this is not true. For example, there were texts messages to Bay
11 Boys Michael S. Papayans and Reno Caldwell. (Otten Decl., ¶17; Exhibit 10)

12 Sang Lee's deposition was taken on May 31, 2017. Lee testified regarding the
13 preservation of evidence.

14 Q. Okay. After you became aware that you had an obligation to preserve
15 evidence related to this case, did you take any steps to preserve
16 evidence?

17 A. Did I take any steps?

18 Q. Yes. Did you do anything to make sure that any evidence that you had
19 wasn't lost or destroyed?

20 A. I just didn't erase it. It's all there. P. 22: 20-25

21 Q. Did you ever do anything to download or image the E-Mails that had
22 on your phone related to this case?

23 THE WITNESS: Well, no, I don't believe so.

24 (Lee Depo., 23:9-16; Otten Decl., ¶18, Exhibit 11)

25 On or about July 4, 2017 Plaintiffs' counsel sent Sang Lees attorneys another
26 meet and confer letter regarding the Responses to Plaintiffs Request for Production
27 of Documents. Set One. (Otten Decl., ¶19; Exhibit 12)

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1 **III. DEFENDANTS STATEMENT OF FACTS**

2 [Intentionally left blank for response]

3 **IV. DISPUTED DISCOVERY**

4 REQUEST FOR PRODUCTION NO. 1:

5 Any and all DOCUMENTS, REFERRING or RELATED TO any
6 PLAINTIFF.

7 Defendant's Response:

8 After a diligent search and reasonable inquiry, responding party 1s not in
9 possession, custody or control of any documents responsive to this request.
10 Discovery and investigation are continuing and responding party reserves the right
11 to amend this response at a later date.

12 Plaintiffs' Argument:

13 Defendant needs to state if there are any responsive documents in his
14 possession, custody or control and, if so, immediately turn them over.

15 Defendants Argument:

16 [Intentionally left blank for response]

17 REQUEST FOR PRODUCTION NO. 2:

18 Any and all DOCUMENTS, REFERRING or RELATED TO the incident
19 that occurred at Lunada Bay involving YOU and John MacHarg on February 1,
20 2016.

21 Defendant's Response:

22 After a diligent search and reasonable inquiry, responding party is not in
23 possession, custody or control of any documents responsive to this request.

24 Discovery and investigation are continuing and responding party reserves the
25 right to amend this response at a later date.

26 Plaintiffs' Argument:

27 Defendant needs to state if there are any responsive documents in his
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1 possession, custody or control and, if so, immediately turn them over.

2 Defendants Argument:

3 [Intentionally left blank for response]

4 REQUEST FOR PRODUCTION NO. 4:

5 Any and all DOCUMENTS, REFERRING or RELATED TO a surfing event
6 organized by Christ Taloa at Lunada Bay for Martin Luther King, Jr. Day that
7 occurred at Lunada Bay on January 20, 2014.

8 Defendant's Response:

9 Objection. Vague, ambiguous, overbroad. However, without waiving said
10 objections: Defendant agrees to produce all non- privileged responsive documents in
11 its possession, custody, or control.

12 Plaintiffs' Argument:

13 Defendant needs to state if there are any responsive documents in his
14 possession, custody or control and, if so, immediately turn them over. Defendants
15 objections should be ruled as not applicable.

16 It is a common principle that the rules of discovery are to be broadly and
17 liberally construed so as to permit the discovery of any information which is
18 relevant and is reasonably calculated to lead to the discovery of admissible
19 evidence. (See, Fed. R. Civ. P. 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495,
20 507(1947). Rule 26 has been broadly construed to “encompass any matter that bears
21 on, or that reasonably could lead to other matter that could bear on, any issue that is
22 or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
23 (citing *Hickman*, 329 U.S. 495). Fed. R. Civ. P. 34(b)(1)(A), requires a request for
24 production to describe an item “with reasonable particularity,” which this RFP does.
25 Moreover, Defendant fails to specify why the request is “vague, ambiguous,
26 overbroad.”

27 Defendants Argument:

1 [Intentionally left blank for response]

2 REQUEST FOR PRODUCTION NO. 9:

3 Any COMMUNICATION with PERSONS who are interested in protecting
4 Lunada Bay from use by NON-LOCALS.

5 Defendants Response:

6 Objection. Vague, ambiguous, overbroad. However, without waiving said
7 objections: Defendant agrees to produce all non- privileged responsive documents in
8 its possession, custody, or control.

9 Plaintiffs' Argument:

10 The request adequately describes the item sought with reasonable
11 particularity. Fed. R. Civ. P. 34(b)(1)(A). Moreover, Defendant fails to specify
12 why the request is "vague, ambiguous, overbroad."

13 Defendant's Argument:

14 [Intentionally left blank for response]

15 REQUEST FOR PRODUCTION NO. 10:

16 Any text messages with surfers who regularly surf, or have regularly surfed,
17 Lunada Bay.

18 Defendant's Response:

19 Objection. Vague, ambiguous, overbroad. Calls for legal conclusion.
20 Premature as to facts of the case have yet to be presented. Unintelligible and
21 nonsensical inasmuch as it seeks communications "with surfers who regularly surf."

22 Plaintiffs' Argument:

23 Defendant needs to state if there are any responsive documents in his
24 possession, custody or control and, if so, immediately turn them over. Defendants
25 objections should be ruled as not applicable.

26 It is a common principle that the rules of discovery are to be broadly and
27 liberally construed so as to permit the discovery of any information which is
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1 relevant and is reasonably calculated to lead to the discovery of admissible
2 evidence. (See, Fed. R. Civ. P. 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495,
3 507(1947). Rule 26 has been broadly construed to “encompass any matter that bears
4 on, or that reasonably could lead to other matter that could bear on, any issue that is
5 or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
6 (citing *Hickman*, 329 U.S. 495). Fed. R. Civ. P. 34(b)(1)(A), requires a request for
7 production to describe an item “with reasonable particularity,” which this RFP does.
8 Moreover, Defendant fails to specify why the request is “vague, ambiguous,
9 overbroad.”

10 Defendant’s Argument:

11 [Intentionally left blank for response]

12 REQUEST FOR PRODUCTION NO. 11:

13 Any emails with surfers who regularly surf, or have regularly surfed, Lunada
14 Bay.

15 Defendant’s Response:

16 Objection. Vague, ambiguous, overbroad. Calls for legal conclusion.

17 Premature as to facts of the case have yet to be presented. Unintelligible and
18 nonsensical inasmuch as it seeks communications "with surfers who regularly surf."

19 Plaintiffs’ Argument:

20 Defendant needs to state if there are any responsive documents in his
21 possession, custody or control and, if so, immediately turn them over. Defendants
22 objections should be ruled as not applicable. All objections should be ordered
23 inapplicable.

24 It is a common principle that the rules of discovery are to be broadly and
25 liberally construed so as to permit the discovery of any information which is
26 relevant and is reasonably calculated to lead to the discovery of admissible
27 evidence. (See, Fed. R. Civ. P. 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495,
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2 on, or that reasonably could lead to other matter that could bear on, any issue that is
3 or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
4 (citing *Hickman*, 329 U.S. 495). Fed. R. Civ. P. 34(b)(1)(A), requires a request for
5 production to describe an item “with reasonable particularity,” which this RFP does.
6 Moreover, Defendant fails to specify why the request is “vague, ambiguous,
7 overbroad.”

8 Defendant’s Argument:

9 [Intentionally left blank for response]

10 REQUEST FOR PRODUCTION NO. 12:

11 Any text messages or records of phone calls with a co-defendant in this
12 matter.

13 Defendants Response:

14 Objection. Vague, ambiguous, overbroad. However, without waiving said
15 objections: Defendant agrees to produce all non- privileged responsive documents in
16 its possession, custody, or control.

17 Plaintiffs’ Argument:

18 Defendant needs to state if there are any responsive documents in his
19 possession, custody or control and, if so, immediately turn them over. Defendants
20 objections should be ruled as not applicable. All objections should be ordered
21 inapplicable.

22 It is a common principle that the rules of discovery are to be broadly and
23 liberally construed so as to permit the discovery of any information which is
24 relevant and is reasonably calculated to lead to the discovery of admissible
25 evidence. (See, Fed. R. Civ. P. 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495,
26 507(1947). Rule 26 has been broadly construed to “encompass any matter that bears
27 on, or that reasonably could lead to other matter that could bear on, any issue that is
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1 or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
2 (citing *Hickman*, 329 U.S. 495). Fed. R. Civ. P. 34(b)(1)(A), requires a request for
3 production to describe an item “with reasonable particularity,” which this RFP does.
4 Moreover, Defendant fails to specify why the request is “vague, ambiguous,
5 overbroad.”

6 Defendant’s Argument:

7 [Intentionally left blank for response]

8 REQUEST FOR PRODUCTION NO. 13:

9 Any emails to or from a co-defendant in this matter.

10 Defendant’s Response:

11 Objection. Vague, ambiguous, overbroad. However, without waiving said
12 objections: Defendant agrees to produce all non- privileged responsive documents in
13 its possession, custody, or control.

14 Plaintiffs’ Argument:

15 Defendant needs to state if there are any responsive documents in his
16 possession, custody or control and, if so, immediately turn them over. Defendants
17 objections should be ruled as not applicable. All objections should be ordered
18 inapplicable.

19 It is a common principle that the rules of discovery are to be broadly and
20 liberally construed so as to permit the discovery of any information which is
21 relevant and is reasonably calculated to lead to the discovery of admissible
22 evidence. (See, Fed. R. Civ. P. 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495,
23 507(1947). Rule 26 has been broadly construed to “encompass any matter that bears
24 on, or that reasonably could lead to other matter that could bear on, any issue that is
25 or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
26 (citing *Hickman*, 329 U.S. 495). Fed. R. Civ. P. 34(b)(1)(A), requires a request for
27 production to describe an item “with reasonable particularity,” which this RFP does.
28

1 Moreover, Defendant fails to specify why the request is “vague, ambiguous,
2 overbroad.”

3 Defendant’s Argument:

4 [Intentionally left blank for response]

5 REQUEST FOR PRODUCTION NOS. 18, 19, 21, 39, 40, 41, 42, 43, 44, 45, 46, 49,
6 50, 53 and 54:

7 These Requests for Production all seek text messages and emails related to
8 the following people: David Melo, Peter Babros, Joe Bark, Charles Mowat, Michael
9 S. Papayans, David Hilton, Jon Lund.

10 Defendants Response:

11 Objection. Vague, ambiguous, overbroad. However, without waiving said
12 objections: Defendant agrees to produce all non- privileged responsive documents in
13 its possession, custody, or control.

14 Plaintiffs’ Argument:

15 Defendant needs to state if there are any responsive documents in his
16 possession, custody or control and, if so, immediately turn them over. Defendants
17 objections should be ruled as not applicable. All objections should be ordered
18 inapplicable.

19 It should be further noted that communications with these individuals are
20 noted in the Redacted Phone Extraction Report and the emails produced.

21 It is a common principle that the rules of discovery are to be broadly and
22 liberally construed so as to permit the discovery of any information which is
23 relevant and is reasonably calculated to lead to the discovery of admissible
24 evidence. (See, Fed. R. Civ. P. 26(b)(2); *Hickman v. Taylor*, 329 U.S. 495,
25 507(1947). Rule 26 has been broadly construed to “encompass any matter that bears
26 on, or that reasonably could lead to other matter that could bear on, any issue that is
27 or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351
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1 (citing Hickman, 329 U.S. 495). Fed. R. Civ. P. 34(b)(1)(A), requires a request for
2 production to describe an item “with reasonable particularity,” which this RFP does.
3 Moreover, Defendant fails to specify why the request is “vague, ambiguous,
4 overbroad.”

5 Defendant’s Argument:

6 [Intentionally left blank for response]

7 **V. PLAINTIFFS’ REQUESTS**

8 Plaintiffs are requesting that Defendant Sang Lee be ordered to produce all
9 the documents that have not been turned over and any objections and/or privileges
10 are not applicable.

11 Plaintiffs are also requesting a determination by this Court that Defendant
12 Sang Lee and his attorneys improperly withheld documents.

13 Plaintiffs are further requesting a determination by this Court and that
14 Defendant Sang Lee destroyed evidence.

15 Finally, Plaintiffs are requesting monetary sanctions against Sang Lee and his
16 attorneys.

17
18 DATED: August 7, 2017

OTTEN LAW PC

19 By: /s/ Victor Otten

20 VICTOR OTTEN

21 Attorneys for Plaintiffs
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